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Supreme Court of the United States

October 1975 Term

Docket No. 75-1750

AL DAYON, individually and on Behalf of Mastercraft Electronics Corp.,

Appellant,

—against—

DOWNE COMMUNICATIONS, INC., THE AETNA CASUALTY AND SURETY COMPANY AND H. WILLIAM KEHL, as Sheriff of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

ANSWER TO MOTION TO DISMISS APPEAL
PETITION OF APPELLANT FOR LEAVE TO AMEND JURISDICTIONAL STATEMENT
PETITION FOR WRIT OF CERTIORARI

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To: The Honorable Justices of the
Supreme Court of the United States:

The petition of Al Dayon, individually and on behalf of Mastercraft Electronics Corp. for leave to amend the jurisdictional statement nunc pro tunc, and to consider the jurisdictional statement, as necessary, nunc pro tunc, as a petition for a writ of certiorari to the New York Court of Appeals, and the answer to the motion of Downe Communications, Inc. to dismiss the appeal as to it, by Bernard G. Ehrlich, his attorney, respectfully shows:

Point I

The appeal is properly before this Court and this Court has jurisdiction of every other denial of federal right.

The appellee Downe Communications, Inc., hereinafter DCI, concedes at pp. 1, 2 of its motion to dismiss that

> The appellant in his jurisdictional statement questions the validity of two New York Statutes...

and that their

> validity has been drawn into question.

Plainly, the appeal to this Court

is proper and this Court has jurisdiction of every other denial of federal right. (Jurisdictional Statement, pp. 5-6, 6-13, 39-43).

The Jurisdictional Statement at pp. 3, 4 states:

> The jurisdiction of this Court is involved pursuant to 28 U.S.C. Section 1257(2) because this is an appeal from a final order of the highest court of the State of New York... which denied interpleaded defendant Dayon and defendant and interpleading plaintiff Aetna Casualty and Surety Co. due process of law and equal protection of law by granting summary judgment to plaintiff Downe Communications, Inc. upon a cause of action not pleaded and not proved and which denied said Dayon and said Aetna Casualty and Surety Co. due process of law and equal protection of law by denying each of them the right to defend the action upon the attachment bond by the plaintiff, Downe Communications, Inc.

Moore's Federal Practice, Judicial Code, p. 371 (Rel. No. 31-1976), Ch. 81, Supreme Court, Section 1257, states:

> Where an appeal is proper, the appellant can include in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal. Prudential Insurance Co. v. Cheek, 259 U.S. 530, 547, 42 S. Ct. 516, 523, 66 L. Ed. 1044, 27 ALR 27. Or he...(can file) a petition for certiorari in addition to his appeal. Columbus & Greenville Ry. Co. v. Miller, 283 U.S. 96, 98, 51 S. Ct. 392, 393, 75 L. Ed. 861. Fluornoy v. Weiner, (1944) 321 U.S. 253, 263, 64 S. Ct. 548, 88 L. Ed. 708.

This Court, in Prudential Ins. Co. v. Cheek, 259 U.S. 530, 547 (1921) held:

> It is assigned for error, aside from the Statute, that the decision of the Missouri court sustaining the cause of action under the second count amounts to depriving plaintiff in error of property without due process of law. This point was set up properly in the State courts as a special claim of immunity under the Fourteenth Amendment; and although under Section 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, it could not have been made the basis of a writ of error from this court, but only a writ of certiorari, we think that, by the fair intendment of the Act, since the record has been brought here properly under the writ of error because involving the constitutionality of a statute, plaintiff in error is at liberty to assign any other ground of error therein, based upon an adverse decision by the State court of last resort upon any right,

title, privilege or immunity specially set up or claimed under the Constitution or laws of the United States.

The Jurisdictional Statement on behalf of appellant Dayon shows at pp. 53-54 that Dayon and Aetna were denied the fundamental federal constitutional right to be heard, to have their day in court and to defend the action upon the statutory attachment bond by DCI against Aetna; it shows at pp. 54-56 that these issues were raised in the State courts and were passed upon by the State courts. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 547 (1921); Missouri, Kansas etc. Ry. Co. v. Elliott, 184 U.S. 530, 534 (1902).

Point II

This Court has jurisdiction of the appeal from the summary judgment in favor of Downe Communications, Inc. on grounds properly raised below and presented to this Court in the Jurisdictional Statement.

This Court in Broad River Co. v. South Carolina, 281 U.S. 537, 540 (1929) stated: "Where the state court has denied to rights asserted under local law, the protection which the Constitution guarantees is the question upon which the petitioners are entitled to invoke the judgment of this Court."

The state courts denied Dayon and Aetna their federal constitutional rights under the due process and equal protection clauses by granting DCI summary judgment

upon a cause of action which was not pleaded, Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1914); Reynolds v. Stockton, 140 U.S. 254, 265, 268, 269, (1891) and which was not proved and which had no basis in fact whatever. Time, Inc. v. Firestone, ___ U.S. ___, 96 S. Ct. 958 (1976); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473; See, Thompson v. Louisville, 362 U.S. 199 (1960); Cole v. Arkansas, 333 U.S. 196, 291 (1947); Vachon v. Louisiana, 414 U.S. 478 (1973).

The Jurisdictional Statement at pp. 3, 4 showed that this issue was before the Court and that it was within the jurisdiction of this Court.

The Jurisdictional Statement at pp. 13, 14 includes this issue in Questions 3, 4, and 6 of the Questions Presented by the Appeal.

The Jurisdictional Statement at pp. 33 shows that the cause of action pleaded by DCI alleged only that in the prior Dayon attachment action against DCI in which that statutory attachment bond was filed, that the Appellate Division, by a non-final order dated February 13, 1973, merely vacated the order of attachment. It did not decide that Dayon was not entitled to the attachment of DCI's property. Jurisdictional Statement pp. A17-A19.

The Jurisdictional Statement shows at pp. 22-24 that the condition for liab-

ility under the statutory attachment bond is the finding that it was "finally decided that the plaintiff was not entitled to an attachment of the defendant's DCI's property," and that the mere vacatur of the order of attachment does not create any liability under that statutory attachment bond. 7A Weinstein-Korn-Miller, N.Y. Civ. Prac., Section 6212.08. (See, also, Jurisdictional Statement pp. 33-34)

The Jurisdictional Statement at pp. 53-56 shows that the New York Courts passed on this issue.

The Jurisdictional Statement at pp. A17-A19 shows that in the Dayon attachment action, in reversing the lower court and vacating the Dayon order of attachment, the Appellate Division made no finding of fact that Dayon was not entitled to the order of attachment. The lower court in that action had found, on the other hand, that Dayon was entitled to the order of attachment. Jurisdictional Statement, pp. A9-A14, NYCPLR 5712 (c)(2) requires the Appellate Division, on reversing a lower court, to

> specify the findings of fact which are reversed or modified and set forth any new findings of fact made by the Appellate Division with such particularity as was employed for the statement of the findings of fact in the court of original instance. NYCPLR 5712(c)(2).

Since the plain findings of fact of the lower court in the Dayon attachment action was that Dayon was entitled to the order of attachment. (Jurisdictional Statement pp. A9-A14), and since those findings of fact were not overruled and were not substituted by contrary findings of fact by the Appellate Division when it vacated the Dayon order of attachment, then it must be deemed that the Appellate Division vacated the order of attachment on grounds other than that Dayon was not entitled to the attachment of DCI's property. See, 7A Weinstein-Korn-Miller, N.Y. Civ. Prac., Section 6212.08, which shows that an order of attachment under present practice can be vacated on "technical grounds" with the result that no liability accrues under the statutory attachment bond.

Yet, upon the fact of the bare vacatur of the order of attachment by the Appellate Division in the action of Dayon against DCI, DCI moved for summary judgment upon the complaint which alleged only that the Appellate Division had "vacated" the Dayon order of attachment; that motion for summary judgment was granted. The lower court, New York Supreme Court, Special Term Part I, in its decision in this action stated:

> ...The order of attachment was ultimately vacated by the Appellate Division.... Accordingly, the liability of the Surety to the plaintiff and the Sheriff has been established.

(Underscoring added) (Jurisdictional Statement, pp. A5-A6)

The sole basis for granting DCI summary judgment was the bare fact that the Appellate Division had vacated the Dayon order of attachment. The statutory attachment bond and NYCPLR 6212(b), (Jurisdictional Statement pp. 22-24) however, condition liability not on mere vacatur of an order of attachment, but upon a final decision that "plaintiff was not entitled to an attachment of plaintiff's property." This condition was not alleged in the complaint, and it was not proved on the motion for summary judgment. The court did not find that this condition of the statutory attachment bond had been met.

In this action, the state court of first instance did not make any finding, as it could not, that the Appellate Division in the Dayon attachment action had "finally decided that Dayon was not entitled to an attachment of the property of Downe Communications, Inc."; (Jurisdictional Statement, pp. A5-A6); neither did the Appellate Division on the appeal in this action (Jurisdictional Statement, pp. A-4). However, the New York Court of Appeals, in its opinion at 37 N.Y. 2d 903 (1975) (Jurisdictional Statement, pp. A1-A4) stated that:

> In the prior action by interpleaded defendant-appellant Dayon against plaintiff Downe Communications, Inc.,

> it was conclusively decided that Dayon was not entitled to the order of attachment (Dayon v. Downe Communications, 41 A.D. 2d 611, aff'd. 32 NY 2d 937). Thus, plaintiff was properly awarded summary judgment on the issue of liability on the bond. (See, Subin v. United States Fid. & Guar. Co., 12 A.D. 2d. 49, 50).

The Subin case, cited by the New York Court of Appeals, was decided under the predecessor statute to the present NYCPLR 6212(b); under the predecessor statute, liability upon the attachment bond accrued upon mere vacatur, in those words, of the order of attachment. 7A Weinstein-Korn-Miller, N.Y. Civ. Prac. Section 6212.08; N.Y.C.P.A. Section 907; 7B McKinney's Consolidated Laws of New York Annotated, Legislative Studies and Reports, pp. 59-60. The present statute, NYCPLR 6212(b) conditions liability on the attachment bond on a very different basis, namely upon a final decision by the attachment court that the 'plaintiff was not entitled to an attachment of defendant's property'.

The reliance by the New York Court of Appeals on the Subin case, 12 A.D. 2d 49, 50, shows that the said court was clearly adopting and applying a plainly wrong principle of law, Chicago, B. & O. Ry. Co. v. Babcock, 204 U.S. 585, 598 (1906) and shows that it was arbitrary and denied Dayon and Aetna the equal protection of law.

The New York Court of Appeals citation of "Dayon v. Downe Communications (41 A.D. 2d 611, aff'd. 32 N.Y. 2d 937)" is factually wrong because the Appellate Division order vacating the attachment was never appealed to or reviewed by the New York Court of Appeals. The application by Dayon to the Appellate Division for leave to appeal to the New York Court of Appeals was denied. Since that Appellate Division order was not a final order, it was not appealable as of right to the New York Court of Appeals. NYCPLR 5601. The citation, "32 N.Y. 2d 937" involved another appeal.

The jurisdiction of the New York Court of Appeals under the settled law of that state is confined to ruling on issues of law only. N.Y. Const. Article VI, Section 3; Ballen v. Potter, 251 N.Y. 224 (1929); NYCPLR Section 5501(b). The New York Court of Appeals has no power and no jurisdiction under the settled construction of the New York State Constitution, Article VI, Sec. 3, and the NYCPLR Section 5501(b) to make original findings of fact. Bigelow v. Forrest, 76 U.S. 339, 350, 351 (1869); Ex-parte Wilson, 114 U.S. 417, 421 (1885); Windsor v. McVeigh, 93 U.S. 274,282, 283 (1876).

There is absolutely no basis in fact in the Dayon attachment action for the above-quoted statement of the New York Court of Appeals in this action that "it was conclusively decided that Dayon was

not entitled to the order of attachment"; (Jurisdictional Statement, pp. A1-A4) and no court had made such a finding in the Dayon attachment order. Time, Inc. v. Firestone, ___ U.S. ___, 96 S. Ct. 958, 969, 970 (1976); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473, 474 (1918).

The New York courts gave summary judgment to DCI upon a cause of action which it had not pleaded and which it had not proved, and thereby denied Dayon and Aetna their constitutional right to due process of law and equal protection of the law. Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1914); Reynolds v. Stockton, 140 U.S. 254, 268, 269 (1891).

The New York Court of Appeals violated Dayon's and Aetna's constitutional right to due process of law and equal protection of law by giving to the nonfinal order of the Appellate Division dated February 13, 1973 in the Dayon attachment action against DCI (Jurisdictional Statement pp. A17-19), which involved different parties and different issues, and in which no court made any finding of fact that 'Dayon was not entitled to an attachment of DCI's property, (Jurisdictional Statement pp. 22-24, A17-A19), a construction that had no basis in fact, as noted above, and also by holding that such construction of the Appellate Division order in the attachment action, Jurisdictional Statement,

pp. A17-A19, was conclusive against Aetna Casualty and Surety Co. in this action (Jurisdictional Statement pp. A1-A4), even though Aetna was not a party to the Dayon attachment action against DCI, Hansberry v. Lee, 311 U.S. 32, 37, 40 (1940); United States v. Moser, 266 U.S. 236, 242 (1924), and even though this action involves a different cause of action, between different parties upon different facts than the attachment action. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-579 (1973).

Under New York Law the non-final order in the Dayon attachment action has no conclusive effect in a subsequent action against the surety on the attachment bond and it is not conclusive against the surety even if it had been on the same point, and even if there had been a specific finding of fact on that point. Liberty Mutual Ins. Co. v. George Colon & Co., 260 N.Y. 299 (1932); Sears, Roebuck & Co. v. 9th Avenue and 31st Street Corp., 274 N.Y. 388 (1937); Bannon v. Bannon, 270 N.Y. 484 (1936); Bridgeport Ins. Co. v. Wilson, 34 N.Y. 275 (1866); Hershkowitz v. Travelers Ins. Co., 272 A.D. 584 (1st Dept. 1947).

Aetna is entitled to its day in court and to present a full defense against the complaint of DCI against Aetna. Blonder-Tongue v. University Foundation, 402 U.S. 313, 329 (1970).

It is respectfully submitted that

the challenge to the constitutionality to NYCPLR 8012(b)(3) by Dayon necessarily implicated and thereby challenged the constitutionality of NYCPLR 6212(b) and that the judgment of the court could not have been rendered without deciding that issue. The jurisdiction of this Court is properly involved in this issue. Green Bay & Canal Co. v. Patten Paper Co., 172 U.S. 58, 68 (1898); also, Jurisdictional Statement pp. 42, 43; Powell v. Brunswick Surety, 150 U.S. 433, 440 (1893).

The Jurisdictional Statement at pp. 32-33 shows that the complaint in this action by Downe Communications, Inc. against Aetna Casualty & Surety Co. alleged it to be an action upon a statutory attachment bond which had been filed in court in the state attachment action wherein Al Dayon, individually and on behalf of Downe Communications, Inc., was the plaintiff against Downe Communications, Inc. and others, as defendants. The Jurisdictional Statement shows at pp. 22-24 that the said Dayon attachment bond was made pursuant to the New York Civil Practice Law and Rules Section 6212(b). The text of NYCPLR 6212(b), which was not set out in the Jurisdictional Statement, and for which amendment nunc pro tunc is sought to do so, is as follows:

> Undertaking. On a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than two hundred fifty dollars, a specified part

thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the Sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the Sheriff for his fees.

It is respectfully submitted that NYCPLR 6212(b) on its face and as applied is unconstitutional and deprives petitioner of his federal constitutional rights. It is vague and overbroad, and fails to set forth any standard for the court to apply the terms thereof including the setting of the amount of the bond. The statutory requirement for an attachment bond is not tailored to meet any state or valid public welfare purpose. See, Lindsey v. Normet, 405 U.S. 56 (1972); (See, also, Jurisdictional Statement and citations, pp. 46-53). NYCPLR 6212(b)requires that a plaintiff file a statutory bond in an amount to be set by the court as a condition precedent to being allowed to make use of and to employ the statutory procedure of attachment; it thereby unconstitutionally conditions and limits the right of a plaintiff to resort to the court to resolve his problem to resort to and employ the universal and long-established pro-

cedure of attachment, and discriminates between plaintiffs on the basis of wealth, allowing only those plaintiffs with enough money to satisfy the arbitrary demands of the court to employ that procedure. Jurisdictional Statement and citations, pp. 46-53; Smith v. Bennett, 305 U.S. 708 (1961). There is no standard in the statute by which a court is guided in setting the amount of the bond and any court can arbitrarily fix a bond in an amount so high as to preclude the use of that statutory attachment remedy against any particular defendant. Jurisdictional Statement and Citations, pp. 46-53.

Point III

The motion to dismiss by DCI is not well founded.

The appellee, Downe Communications, Inc., hereinafter DCI, moved to dismiss the appeal on the grounds stated in its motion at page 1 that

> No federal question is presented with respect to appellee, DCI,

and at page 2 that

> The award of summary judgment to DCI was not based on the statutes whose validity has been drawn into question, rather the judgment in favor of DCI on the attachment bond was

made because no triable issue of fact existed as to appellant's liability.

The appellee DCI, relying upon United States v. Pink, 315 U.S. 203 (1942), argues that there is no federal question in this appeal from the decision of the New York Court of Appeals, and that only a state question is involved. United States v. Pink, supra, is not applicable either on the law or on the facts and is distinguishable on both the law and the facts from this case at bar.

The order which was given conclusive effect by the New York Court of Appeals was a non-final order; it was not a final judgment on the merits. Jurisdictional Statement, pp. A17-A19.

The appellee, at page 3 of its motion, quoted a portion of the decision of this Court in United States v. Pink, supra. However, the appellee omitted to include relevant portions of the full quotation which show that it is not applicable to the case at bar. Thus, the full quotation appears as follows:

> First. Respondent insists that the complaint in this action was identical in substance and sought the same relief as the petition of the United States in the Moscow case, and that his answer set up the same defenses as were successfully sustained against the United States by the defendants in that case. He also maintains that both

> parties agreed, on the motion, for summary judgment, that the decision in the Moscow case governed this cause, having no issues to be tried. We agree with those contentions. It is in accord not only with the motion papers, but also with the rulings of the New York Court of Appeals that the Moscow case 'left open no question which has been argued on this appeal'. In view of that ruling we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow case. That is distinctly a question of state law, on which New York has the last word. United States v. Pink, 315 U.S. 203, 215, 216 (1942).

The complaint in this action has no counterpart in or to any other complaint by appellee DCI, or any other plaintiff against the same defendant for the same cause. The issues presented by this complaint of appellee DCI against Aetna Casualty and Surety Co. are unique to this complaint of appellee DCI against Aetna Casualty and Surety Co.; they are not "identical in substance and sought the same relief" United States v. Pink, supra, at p. 215, as in any 'prior' complaint, because there was no 'prior' complaint on that or any similar claim by appellee DCI; and, of course, there was no 'prior' answer, and there was no "answer that set up the same defenses". United States v. Pink, supra, at p. 215.

The "propriety under New York law of grounding the motion for summary judgment on a prior adjudicated case", United States v. Pink, supra, is not the issue in this case.

This court, in United States v. Pink, supra, at p. 216, 217, even under the facts in that case, went on to show and to hold that the

> Moscow case is not res judicata, since respondent was not a party to that suit ....Nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy (Durant v. Essex Company, 7 Wall. 107), the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases. Hertz v. Woodman, 218 U.S. 205, 213-214.

The upshot of the matter is that we now reach the issues in the Moscow case insofar as they are embraced in the pleadings in this case. And there is no reason why we cannot take judicial notice of the record in this Court of the Moscow case....

This Court, in United States v. Pink,

supra, at p. 217 thereupon reviewed the case, decided that the "question of foreign law is not to be determined exclusively by the state court", and that "The claim of the United States based on the Litvinov Assignment raises a federal question," and that "This Court will review or independently determine all questions on which a federal right is necessarily dependent." (Underscoring added)

The issue in Pink was whether the New York Court of Appeals could impose a state view which was opposed by and contrary to a federal view on a matter governed exclusively by the federal power. This court held that since the matter was governed exclusively by the federal power, that the federal view must prevail over that of the state view and the state could not decide the issue.

Conclusion

It is respectfully urged that the appellee's motion to dismiss should be denied and that the appellant's petitions should be granted.

Respectfully submitted,

Bernard G. Ehrlich

Dated : September 7, 1976
New York, New York